

EPA ORDER

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USE OF CONTRACTOR SERVICES TO
AVOID IMPROPER CONTRACTOR RELATIONSHIPS

1. PURPOSE. This Order is designed to assist Agency employees to avoid improper contractor relationships in performing contract management activities.

2. BACKGROUND. Past contract management problems identified by the Office of the Inspector General and the General Accounting Office have indicated that Agency contracts were not always administered in accordance with applicable laws, regulations, and policies. They also identified cases in which insufficient controls were established to preclude fraud, waste and abuse, and conflicts of interest, and to safeguard Agency assets.

The Federal Acquisition Regulation (FAR) prohibits personal services contracts unless specifically authorized by statute. Personal services contracts circumvent civil service laws, which require the government to obtain its employees by direct hire in accordance with Office of Management and Budget ceilings, and inappropriately augment Agency staff without proper legislative review.

3. RESPONSIBILITIES. Contracting Officers (COs), Project Officers (POs), Delivery Order Officers (DOOs), Delivery Order Project Officers (DOPOs), Work Assignment Managers (WAMs), Remedial Project Managers (RPMs), On-Scene Coordinators (OSCs), Task Managers (TMs), and all other EPA employees are responsible for ensuring that personal services relationships between Government employees and contractor personnel are avoided.

4. DEFINITION. A personal services contract is a contract which, by its terms or as administered, results in contractor personnel being subject to relatively continuous supervision and direct control by a Government official or employee. A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. These contracts make the contractor personnel appear, in effect, to be Government employees.

Attached is a list of examples of personal services, which are provided to further clarify some of these prohibited activities. (Appendix A)

5. ASSESSING THE NATURE OF A CONTRACT. FAR Part 37.104(d) provides the following descriptive elements to be used as a guide in assessing whether a proposed contract is personal in nature. These elements can also be used as a guide to determine if the way in which a contract is administered creates a personal services contract.

An improper contract relationship may exist if:

- a. Contractor performance is done on site.
- b. Contractor's principal tools and equipment are furnished by the Government.
- c. Contractor's services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of an assigned function or mission.
- d. Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
- e. The need for the type of service provided by the contractor can reasonably be expected to last beyond one year.
- f. The inherent nature of the service or the manner in which it is provided reasonably requires, directly or indirectly, Government direction or supervision of contractor employees in order to--

- (1) Adequately protect the Government's interest;
- (2) Retain control of the function involved; or
- (3) Retain full personal responsibility for the function in a duly authorized Federal officer or employee.

Note: all of these elements need not be present to have an improper personal services contract. Additionally, having all of these elements present does not necessarily mean that an improper personal services contract exists. The key element is whether the Government exercises continuous supervision and control over the contractor personnel performing the contract. Each situation must be reviewed and a determination made on a case-by-case basis.

As in any contract situation, Agency employees should contact the CO for advice and guidance whenever they have questions regarding relationships with contractor personnel. Agency employees may also contact the Contracts Law Branch, Office of General Counsel (OGC) for further guidance. Agency employees who believe that a personal services contract exists should immediately notify the CO.

6. PRINCIPLES FOR MANAGING A CONTRACT.

a. The CO is responsible for determining, prior to award, that the contract does not involve the procurement of personal services. Even though supervision by Government employees is not directly required by the terms of the contract, a personal services contract may evolve through improper contract management. Agency employees who believe that, through improper contract management, a contract has evolved into a personal services contract should immediately notify the CO. The CO will investigate these situations and take appropriate action to ensure that contracts are managed to maintain proper contractual relationships.

b. Technical management of a contractor's performance generally relates to the manner in which authorized EPA employees provide work direction to the contractor. Exchange of information of a technical nature is not prohibited. Appropriate technical direction is the clarification of ambiguous technical requirements to ensure efficient and effective contractor performance. Proper technical direction is not supervision or assignment of tasks to contractor personnel. In managing the contract, the following principles should be observed:

(1) Interaction with Contractor Personnel

(a) **All contractors:**

(i) The contract shall govern contract performance. This can best be accomplished with a well-defined statement of work (SOW), including SOWs in work assignments (WAs), technical direction documents (TDDs), or delivery orders (Dos), which reference the authority of the contract.

(ii) The PO shall notify the CO immediately if there is a need to change the contract so that the CO can issue a contract modification.

(iii) Unless otherwise provided in the contract, all work will be initiated by the issuance of WAs or DOs signed by the CO or if provided, by TDDs signed by the PO. These will be issued to the contractor's official point(s) of contact as shown in the contract, e.g., Project or Program Manager (PM) or Site Manager (SM). Any communication to the contractor's point of contact shall come from the EPA CO, PO, or his/her authorized designees, e.g., WAMs, DOOs, DOPOs, RPMs, OSCs, or TMs. Other EPA employees may not assign tasks unless they have specific authority to do so. Note: TDDs may only be used to initiate work in contracts requiring a fully-dedicated contractor team and as limited by the contract.

(iv) Technical direction shall be issued in writing from the PO or authorized designee (with a copy to the CO) to the contractor's point(s) of contact. If provided orally, the technical direction must be confirmed in writing within five (5) calendar days. Technical direction shall not be used to initiate work or to change WAs or TDDs or the contract. Agency employees shall not give instructions separately to individual contractor personnel.

(v) The PO or designee may authorize meetings with the contractor's point(s) of contact for the purposes of exchanging technical information among contractor personnel and EPA employees or assisting in contract performance, e.g., to discuss the status or progress of effort under a WA or DO.

Exceptions to the prohibition against direct interaction between an Agency employee and contractor personnel include: 1) a Government employee's contacts to the various Agency hotlines and helplines to request and receive information and literature regarding the Agency's media programs, 2) requests by Government employees for technical assistance and ADP user support services where the technical assistance is mandated and monitored under an existing contract, and 3) participation in discussions at professional meetings attended by both Government employees and contractor personnel, which are not in connection with the performance of a contract.

Examples of ADP user support services are Personal Computer/Local Area Network (PC/LAN) troubleshooting support, software support, PC training, data recovery assistance, and disk archiving and other similar automated data processing (ADP) support as defined in a specific contract. These technical

services are rendered and the contract administered through established ADP support offices such as the Washington Information Center (WIC).

(vi) Agency employees must not intervene in a contractor's hiring, firing, or promoting of contractor personnel; assigning particular employees to specific tasks; or rewarding individual contractor personnel. Evaluation of contractor performance, whether positive or negative, shall be provided through the award fee process, if applicable, or through the EPA PO to the contractor point(s) of contact. Evaluation shall relate to the timeliness or quality of deliverables or services provided, and shall not be directed at the performance of individual contractor personnel.

(vii) Agency employees shall not ask contractors to hire in a "holding pattern," individuals who may be candidates for Agency positions, pending completion of competitive civil service procedures.

(viii) Agency contracts shall not require or permit contractors to purchase supplies or services for use by EPA employees unless specifically required by a contract for its performance.

(ix) All requests for corrective or follow-up actions by contractors shall be directed from the EPA PO or authorized designee to the contractor point(s) of contact. Similarly, contractor personnel must operate through the contractor's point of contact to obtain any information needed to complete the work.

(x) Agency employees shall prepare appropriate documentation for the record of meetings, trips, and telephone conversations relating to the contract.

(b) Contractors working in EPA facilities only:

(i) Agency employees must avoid situations in which one EPA on-site contractor provides support to another EPA on-site contractor, except when the contract requires such support to be furnished (e.g., janitorial services or security services). Similarly, Agency employees shall avoid situations in which one EPA on-site contractor provides oversight for another EPA on-site contractor.

(ii) Agency employees shall not routinely provide contractor personnel with copies of EPA internal administrative or other correspondence, except when it affects the conditions of the facility in which the contractor's personnel are working (e.g., scheduled repair work to be performed or building closings).

(iii) Agency employees shall not provide contractor personnel with access to facsimile machines, photocopiers, computers, or file rooms where the Agency receives, copies, or stores sensitive or confidential information unless appropriate safeguards are in place to ensure adequate protection of this information. These safeguards include security clearances, signed confidentiality statements, and others. Sensitive or confidential information includes information protected under the Trade Secrets Act or Privacy Act, confidential business information, management sensitive information, and enforcement sensitive information. An example of acceptable access after the appropriate safeguards are in place is the EPA Secure Telecommunications Center, which processes cables to the EPA from the State Department secure network, for which contractor personnel have security clearances. CBI may not be given to contractor personnel under any circumstances unless there is authority for such disclosure and the procedures under 40 C.F.R. Part 2, Subpart B have been followed.

(2) Identification of Contractor Personnel

(a) **All contractors:**

(i) At all times, it shall be readily apparent which organization employs an individual. Agency security offices must require contractor personnel to display appropriate badges that identify them as contractor personnel. The employing organization should also be identified. These requirements shall be included in all contracts that may create situations in which contractor personnel could be mistaken for EPA employees, e.g., advisory and assistance services contracts, hotline/helpline contracts, community meeting tasks, or field work tasks under Superfund contracts.

(ii) In all points of contact, e.g., during meetings, on Agency systems such as voicemail or

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electronic mail (d-mail or e-mail), Agency officials must require contractor personnel to identify themselves as such and their employing organization.

(iii) Agency security offices shall ensure that contractor personnel do not have unlimited access to EPA office areas.

(b) Contractors working in EPA facilities only:

(i) In official telephone directories and listings, contractor listings shall be shown in a type-face different from that used for Agency employees, in separate listings, with special codes, designated by use of asterisks or parentheses, or in some other manner that distinguishes contractor personnel from EPA employees.

(ii) Contractor personnel subject to the Service Contract Act shall wear company-issued uniforms, in accordance with their company policies, e.g., moving contractors, security guards, janitorial workers, etc.

(3) Attendance at EPA Functions and Meetings

All contractors:

(a) Agency employees shall not allow contractor personnel to attend EPA functions, staff meetings, committees, or activities, including holiday parties, except as described in (b) below.

(b) Agency employees shall not allow contractor personnel to attend EPA meetings or conferences (including conference calls) unless required for contract performance, as documented in the contract's statement of work or in a specific WA, TDD, or DO.

(c) The CO, PO, or authorized designee shall notify the contractor point(s) of contact through authorized technical direction of the need for attendance by contractor personnel. Attendance must be restricted to specific tasks as defined in the SOW and limited to the portion of the session in which the contractor's performance is directly required. Contractor personnel shall never attend meetings as the official representative of an EPA organization. Contractor participation

is generally appropriate when the contractor is serving in an advisory or resource capacity, such as performing research or data gathering. Contractors may also act as facilitators for EPA Quality Action Team sessions under contracts for Total Quality Management implementation.

(4) Contractor Employee Conduct

All contractors:

(a) Agency employees shall not be responsible for resolving contractor personnel's business or personnel matters. Contractor personnel must be directed to their point(s) of contact for resolution of these issues in accordance with the contractor's policies.

(b) Agency employees shall not provide contractor personnel with direction for performance of work products or assignments. Contractor personnel must operate through their point(s) of contact to obtain any direction needed to complete work products or assignments.

(5) Space

Contractors working in EPA facilities only:

(a) To the extent possible, EPA employees shall be physically located in separate areas from contractor personnel; the contractor's areas shall be identified as such.

(b) In cases in which both EPA employees and contractor personnel must occupy or use a general area, there must be physical separation and identification of space.

(c) EPA shall arrange schedules and set priorities for the use of any common equipment by both contractor personnel and Agency employees.

(d) EPA may provide furniture, PCS, software, documentation, telephones, voicemail and other equipment to contractor personnel working in EPA facilities when specified in the contract.

7. ADDITIONAL GUIDANCE.

a. As in any contract situation, Agency employees should contact the CO and Contracts Law Branch, OGC for advice and guidance as required on a case-by-case basis.

b. For further information on this subject, Agency employees should contact the Procurement Policy Branch, Office of Acquisition Management.

/S/

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for Administration and
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APPENDIX A

Examples of Prohibited Personal Services

1. An EPA employee routinely gives instructions and directions directly to contractor personnel.
2. An EPA employee recommends/requests/refuses to have specific contractor personnel assigned to work on a delivery order or work assignment.
3. There is a change in the fields of a database to be maintained by the contractor. An EPA employee instructs a contractor employee on how to perform the changes, rather than having a contract-authorized official issue a written technical direction and/or contract modification for the changes. This would be sent to the contractor point(s) of contact for subsequent instruction to the contractor personnel.
4. An EPA employee suggests promotion, a bonus or other performance award for certain contractor personnel.
5. An EPA employee sits in on an interview for potential contractor employees and offers suggestions on whom to hire.
6. An EPA employee invites contractor personnel to attend an EPA staff meeting or other EPA session not related to contract work performance.
7. An EPA employee enters a contractor's work area when no contractor supervisor is present. The EPA employee has specific requirements he/she wants accomplished and directs contractor personnel to redirect efforts to the new assignment.
8. An EPA employee directly requests contractor personnel to prepare a special report (not otherwise required by the contract) from a database that the contractor employee maintains.
9. A contractor employee participates as a member of the EPA committee planning an EPA award ceremony.
10. An EPA employee is an EEO counselor. A contractor employee complains of mistreatment from contractor management. The EEO counselor pursues the complaint.